In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 582

TRIPLE "AAA" COMPANY, INC., ET AL., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is reported at 378 F. 2d 884. The district court's findings and conclusions are not officially reported, but appear at 17 WH Cases (C.C.H.) 332 and 53 Lab. Cases (C.C.H.) ¶ 31,787.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1967. A petition for rehearing *en banc* was denied on July 10, 1967. The petition for a writ of certiorari was filed on September 7, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' payment to employees of a fixed semi-monthly salary, regardless of the number of overtime hours worked in any workweek, violated the requirement of Section 7(a) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, as amended (29 U.S.C. (Supp. II) 207(a)), provides in pertinent part:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *.

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217), asking the court to restrain petitioners from continuing to violate the overtime and record-

keeping provisions of the Act, and from continuing to withhold payment of overtime compensation due certain employees under the Act. Petitioners denied the violations, claiming the employees in question had been paid at regular hourly rates, on the basis of which their semi-monthly paychecks were properly allocated between straight time and overtime pay.

After a trial of the issues, the district court found that each employe involved had not been paid overtime compensation for hours worked in excess of 40 per week, but had instead received the same semi-monthly pay regardless of the number of hours worked each week or the number of hours worked in a pay period (R. 11). Due to petitioners' failure to keep accurate records of their employees' hours, as required under the Act, the court could not determine the exact number of overtime hours worked, but found that each employee had worked an average of at least 44 hours a week (R. 12). The court thereupon enjoined future violations of the Act by petitioners, as well as the continued withholding of a total of $2,557.69 due to four employees by virtue of petitioners' past violations.

The court of appeals affirmed, concluding that "[s]ubstantial undisputed evidence" supported the district court's findings (Pet. App. ii). Continuing, the court below stated, "The record establishes beyond question that each employee was hired by the month, that no agreement existed between the employer and employees relating to any hourly wage scale, and that the monthly salary was meant by the employer to compensate the employees for an average work week

of forty-four hours" (*id.* at ii-iii). Accordingly, the court of appeals agreed with the district court that under well-established principles the salaries paid such employees included no provision for overtime—and thus violated Section 7(a) of the Act (*id.* at iii-iv). It also concluded that the trial court did not abuse its discretion in enjoining future violations by petitioners (*id.* at v-vi).

ARGUMENT

The decision below correctly applies the governing principles established by this Court in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 581, and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88, 93, and is in accord with all other pertinent decisions of both the Tenth Circuit and other courts of appeals.[1] Further review is thus not warranted.

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[1] See, *e.g.*, *Crawford Production Co.* v. *Bearden*, 272 F.2d 100, 104-105 (C.A. 10); *Patsy Oil & Gas Co.* v. *Roberts*, 132 F.2d 826, 827 (C.A. 10); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F.2d 359, 362-363 (C.A. 10), certiorari denied, 320 U.S. 772; *McComb* v. *Sterling Ice & Cold Storage Co.*, 165 F.2d 265, 270 (C.A. 10); *Nunn's Battery & Electric Co.* v. *Goldberg*, 298 F. 2d 516, 519-520 (C.A. 5); *Beechwood Lumber Co.* v. *Tobin*, 199 F.2d 878, 881 (C.A. 5); *Wirtz* v. *Flame Coal Company*, 321 F.2d 558, 562 (C.A. 6); *Bumpus* v. *Continental Baking Co.*, 124 F.2d 549, 552 (C.A. 6), certiorari denied, 316 U.S. 704; *Walling* v. *Stone*, 131 F.2d 461, 463 (C.A. 7); *Carleton Screw Products Co.* v. *Fleming*, 126 F.2d 537, 540-541 (C.A. 8), certiorari denied, 317 U.S. 634; *Watkins* v. *Hudson Coal Co.*, 151 F.2d 311, 317-319 (C.A. 3), certiorari denied, 327 U.S. 777; *Adams* v. *Union Dime Savings Bank*, 144 F.2d 290, 292 (C.A. 2), certiorari denied, 323 U.S. 751 ~~(C.A. 2)~~; *McComb* v. *Norris*, 177 F.2d 357, 359 (C.A. 4). A number of these cases were cited and relied upon in the opinion of the court below (see Pet. App. iii-iv).

It has been conclusively settled by the above-cited decisions of this Court, as well as the decisions referred to in the accompanying footnote, that the payment of a regular weekly, semi-monthly or monthly salary does not include the statutory overtime premium for weekly hours in excess of 40, in the absence of an agreement specifying a regular hourly rate of pay and not less than one and one-half times that rate for each weekly hour of overtime.[2] In the instant case, as found by both courts below, "no agreement existed between the employer and employees relating to any hourly wage scale," and the record plainly demonstrated that "the amount of each employee's paycheck was unaffected by the actual number of hours worked" (Pet. App. iii). Accordingly, as the court of appeals stated, "the inescapable conclusion is that monthly salary determines only the 'regular rate' and includes no provision for overtime" (*ibid.*).[3]

Walling v. *A. H. Belo Corp.*, 316 U.S. 624, relied on by petitioners (Pet. 4), is inapposite here. In *Missel* this Court distinguished that case by pointing out that in *Belo* the employment contracts "speci-

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[2] See Pet. App. iv, where the court of appeals stated that "such an agreement relating to the regular rate is crucial when an employer pays a flat monthly salary for an average work week of more than forty hours."

[3] Under such circumstances, as the *Missel* decision established, the "regular rate" is determined by reducing the employee's salary to its weekly equivalent, and dividing the result by the number of weekly hours the salary is intended to compensate. One-half that rate times the number of overtime hours worked produces the amount of overtime which must be paid under the Act (see 316 U.S. at 580, and n. 16).

fied an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum" (316 U.S. at 581). The doctrine of the *Belo* case was subsequently codified in Section 7(e) of the Act which, with certain additional limitations, now contains express authorization for contracts containing such provisions.[4] It is evident from the findings of the courts below that the conditions required for such contracts are not met in the instant case, and that *Belo* was properly distinguished by the court of appeals (see Pet. App. iv).

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[4] During the period pertinent to this litigation, Section 7(e), which became Section 7(f) as of February 1, 1967, provided as follows (63 Stat. 214, as amended, 75 Stat. 69):

> No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, * * * if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in * * * section 6 * * * and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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